

**IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	
)	
DON EUGENE SIEGELMAN, and)	CRIMINAL NO. 2:05-CR-119-MEF
RICHARD M. SCRUSHY.)	

**UNITED STATES' RESPONSE TO DEFENDANTS' OBJECTIONS TO
MAGISTRATE'S REPORT AND RECOMMENDATION DENYING JURY
CHALLENGE**

COMES NOW the United States of America, by and through Louis V. Franklin, Sr., Acting United States Attorney for the Middle District of Alabama, and William Welch, Chief of the Public Integrity Section of the Criminal Division of the United States Department of Justice, and hereby responds to Defendants Scrushy's and Siegelman's Objections to Magistrate's Report and Recommendation Denying Jury Challenge (hereinafter, the "Objections"). This Court should reject each of Defendants' objections, and affirm Magistrate Judge Coody's conclusions that Defendants have not shown a substantial violation of the JSSA nor any violation of the Fifth or Sixth Amendments from this Court's implementation and operation of the Jury Plan. In their Objections, Defendants have not raised any issue not previously addressed by the United States in its prior pleadings, and rejected by this Court in Magistrate Judge Coody's Report and Recommendation in this case or in Magistrate Judge Boyd's Report and Recommendation or Judge Thompson's Order in United States v. Carmichael, 467 F. Supp. 2d 1282 (M.D. Ala. 2006). Accordingly, the United States, pursuant to this Court's Order of May 15, 2007, responds to the Objections by reference to, reliance upon, and incorporate of, its prior submissions and pleadings, including the reports of the government's expert, Stephen Elmore, already provided to this Court, as well as the opinions and

orders of this Court in this case and Carmichael.

In particular, the United States notes that Defendants identify the following issues regarding their claim that this Court's implementation and operation of its Jury Plan violates the JSSA: (1) the Court's failure to update mailing addresses, (2) the Clerk's liberal deferral practice, (3) violations of the Plan's 15% limit on the use of deferred jurors, (4) the "scattering violation," (5) the stacking of jurors in "double draw pools," (6) the Clerk's granting of two years excusals, (7) the "bleed-over jurors" in the 2001 and 2005 QJWs, and (8) the Court's duty to supplement the QJW. The United States has already responded to each of these issues through its prior pleadings and arguments, including those made at the evidentiary hearing in April 2006, and incorporates all of them by reference.

In addition to its prior submissions, the government notes that as to the issue of updating the mailing lists, the JSSA includes "no requirement that the district court clerk take measures to correct a low response rate, so long as it is high enough to generate enough names for the qualified jury wheel to enable staffing the required number of juries." United States v. Gometz, 730 F.2d 475, 480 (7th Cir. 1984) (Posner, J.). Defendants have not shown that this Court had any difficulty filling either the 2001 or 2005 QJWs. Accordingly, they are not entitled to any relief based on the response rate to the mailing of the juror questionnaires or this Court's decision not to update the addresses of the voter registration lists.

Further, in their Objections, Defendants contend that Magistrate Judge Coody erred by ruling that the express language of the Jury Plan does not apply the 15% limitation on deferred jurors to grand juries. Even assuming arguendo that Defendants are correct on this point, the United States has shown in its prior pleadings and submissions that they have failed to show that a breach of

the 15% limitation for certain pools has resulted in a substantial, rather than a technical, violation of the JSSA.

As to their Fifth and Sixth Amendment claims, Defendants raise the following issues: (1) they have satisfied the second prong of the Duren test, (2) they have satisfied the third prong of the Duren test, and (3) they have shown intentional discrimination by the Clerk's office. As to each of these issues, the United States rests on its prior submissions which demonstrate Defendants' failure to show an absolute disparity of greater of 10% to meet the second prong of Duren and to produce any evidence of intentional discrimination by the Clerk's office – proof essential to their ability to succeed under the third prong of Duren and the Equal Protection Clause of the Fifth Amendment.

Given the depth and breadth of litigation concerning this District's Jury Plan, the United States submits that each issue Defendants raise in their Objections has already been adequately addressed by the government and this Court. The United States welcomes any directive to brief further any specific issue identified by this Court as an aid to its decisional process.

Respectfully submitted this the 21st day of May, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted,

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